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In the Supreme Court of the United States

OCTOBER TERM, 1975

SCOTT HUDGENS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1–A15)[1] is reported at 501 F. 2d 161. The Board's supplemental decision and order (Pet. App. A17–A20) are reported at 205 NLRB No. 628. The Board's original decision and order (Pet. App. A33–A40) are reported at 192 NLRB 671.

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[1] "Pet. App." refers to the appendix to the petition; "J.A." refers to the joint appendix printed for this Court "S.A." refers to the Board's supplemental appendix.

JURISDICTION

The judgment of the court of appeals was entered on October 18, 1974 (Pet. App. A16). The petition for a writ of certiorari was filed on December 20, 1974, and granted on March 17, 1975. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant portions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are as follows:

> Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities * * *.
>
> Section 8 (a). It shall be an unfair labor practice for an employer—
>
> > (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 * * *;
>
> Section 13. Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

QUESTION PRESENTED

Whether the Board reached a proper accommodation between property rights and employee rights by concluding that, in the circumstances of this case, the owner of a large shopping center violated the National Labor Relations Act by prohibiting warehouse employees, engaged in a lawful strike against their employer, from seeking support for that strike by picketing the entrances to a retail store in that center leased by the employer.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

In January 1971, the warehouse employees of Butler Shoe Company ("Butler"), who are represented by Local 315, Retail, Wholesale and Department Store Union, AFL–CIO (the "Union") (Pet. App. A25, A35–A36; A. 63), went on strike for a new contract (A. 63, 80, 82). In order to gain support for their contract demands, the warehouse employees decided to picket not only Butler's warehouse, but all of its retail stores in the Atlanta area, including the store located in the enclosed mall at the North DeKalb Shopping Center in suburban DeKalb County, Georgia, outside Atlanta (A. 77–78, 80–82, 94).

The North DeKalb Shopping Center is owned and operatedby petitioner Hudgens (Pet. App. A22, 10–11, 113). The center covers approximately 55 acres of land, and consists of a large central structure housing 60 stores and a parking lot surrounding it that can accommodate 2,640 automobiles (Pet. App. A22; A.

11, 16, 50, 103, 111; S.A. 2). On the average, about 45,000 people from the greater Atlanta area visit the center each week (Pet. App. A28; A. 142–143).

The shopping center is located near the intersection of Lawrenceville Highway and North Druid Hills Road, both busy four-lane streets (Pet. App. A35; A. 11, 16, 105, 141–142; S.A. 2. There are five entrances to the center, which open into the parking lot. The three northern entrances are reached by turning off North Druid Hills Road onto three, two-lane streets. These streets, which are lined with both commercial and residential establishments, end after one block at the center entrances, at which there are stop signs. There are no public sidewalks adjacent to these entrances, but there is a public right of way (A. 16, 105–107, 144–145). The two eastern entrances are reached directly from Lawrenceville Highway (A. 16, 105–106, 145–146). There are no stop signs on Lawrenceville Highway for cars entering the center entrances, but there is a stop light 175 feet beyond the northern end of the center, where Lawrenceville intersects with North Druid Hills Road (A. 107, 145–146). There are no public sidewalks adjacent to the Lawrenceville entrances (S.A. 2). Most customers enter the center by cars or buses (A. 142).

The shopping center or mall building, which is surrounded by the parking lot,[2] is located in the middle

[2] There are traffic signs, including speed limit signs, posted on the parking lot (A. 152–153). Hudgens' security staff enforces these limits and, when necessary, the county police are called (A. 150, 153–154).

of the property, approximately 500 feet from each of the entrances to the center (Pet. App. A35; A. 91, 99). While several of the stores in the building have entrances fronting on the parking lot, most of the stores, including that of Butler, can be entered only from the mall inside the building. There are four customer entrances[3] into the building, which are used by 85 to 90 percent of the shoppers in the stores that can be entered only from the mall (Pet. App. A35; A. 11–12, 50, 104). The building is encircled by a raised sidewalk about 10 feet wide, except at the four entrances where it is 25 feet wide (A. 110–111, 113). The doors to the building are open on weekdays from 7 a.m. to 10 p.m., and on Sundays from 10 a.m. to 7 p.m. (A. 112, 150–151).

The inside of the building is a large, enclosed mall. The stores front on aisles, which are 30 to 40 feet wide and intersect (A. 50–51, 110). The aisles contain planters, benches, decorative and drinking fountains, pools, kiosks, a carrousel ride for children, and a charity booth for groups who have obtained a permit. There are restrooms off the aisles (A. 108–109, 113, 116–117, 118, 124–126). The mall building is also used for general promotional activity, such as fashion and camping shows (A. 158–159, 167–168), and it has an auditorium which is leased to approved groups (A. 61–62, 127–128).

All of the stores in the mall building, including Butler's, are owned by and leased from Hudgens

[3] Each entrance is approximately 20 feet wide, with six or eight swinging doors (A. 11).

(A. 113).[4] The lease grants the tenants, their employees, agents, customers, and invitees the "nonexclusive right to use the parking and other common areas" in the shopping center (A. 53). The tenants share in the maintenance costs of the common areas (A. 54, 122)[5]. The lease also provides that tenants shall join the Merchants' Association and pay an initial fee for promotion and an additional monthly fee for continued membership (A. 59). The Merchants' Association leases the auditorium and issues permits for the charity booth in the mall (A. 60, 61–62, 125, 128). Its elected board of directors is the "governing body for the events and advertising and the expense incurred by each on the shopping center" (A. 157–158).

On the morning of January 22, 1971, four warehouse employees entered the enclosed mall with placards reading, "Butler Shoe Warehouse on Strike, AFL–CIO, Local 315" (Pet. App. A36; A. 12, 98). Before the Butler store opened, the four employees sat on a bench near an entrance to the store (Pet. App. A36; A. 12, 98). Douglas Ballard, the general manager of Hudgens' shopping center,[6] noticed the seated employees and told them that they could not picket in the mall

[4] The Rich's store, in a separate building adjacent to the mall building, is owned by Rich (A. 113).

[5] Hudgens has a maintenance staff of four and provides for trash collection. The center also has its own sewage system (A. 121–122, 154).

[6] Concededly, Ballard was acting as Hudgens' agent (A. 11).

or in the parking lot because these areas were private property (Pet. App. A36; A. 12, 78, 90, 98). Ballard also told the employees that they would have to picket on the Lawrenceville Highway or on North Druid Hills Road and that, if they did not leave, they would be arrested (Pet. App. A25–A26; A. 17–18, 19, 79, 90, 98). The employees left the mall, but returned a short time later and began picketing in the area of the mall immediately adjacent to Butler's store (Pet. App. A36; A. 12, 15, 98). The store, which is located where two aisles of the mall intersect, has display windows and an entrance on each of these aisles (A. 15, 50, 85–86, 110). Two pickets walked in parallel lines in each aisle, close to the side of the store (A. 15, 85–86; S.A. 1).

The picketing was peaceful and continued for about 30 minutes (Pet. App. A36; A. 12, 98). At approximately 11:30 a.m., Ballard telephoned the shopping center and had one of the employee-pickets called to a nearby phone (Pet. App. A36; A. 12, 17–18). Ballard warned that, if the picketing did not stop in thirty minutes, he would have the police at the center to lock up the pickets (*ibid.*). Shortly thereafter, Hudgens' attorney told the Union's attorney that picketing was not permitted within the enclosed mall and that, if the pickets did not leave, Hudgens would telephone the DeKalb County Police Department and obtain arrest warrants for criminal trespass (Pet. App. A36;

A13. The pickets left the premises and did not return (Pet. App. A36; A. 91).[7]

B. THE BOARD'S CONCLUSIONS AND ORDER

Upon a charge filed by the Union, the Board held that Hudgens had violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), by threatening to cause the arrest of Butler's picketing employees,[8] and entered an order requiring Hudgens to cease and desist from such conduct in the future (Pet. App. A18, A39–A40). The Board found that the employees were engaged in "activity coming directly within the ambit of Section 7, viz. an economic strike engaged in by employees against their own employer" (Pet. App. A18). The Board concluded that "their employer, whose store happens to be located within [Hudgens'] shopping mall, was not insulated from the picketing merely

[7] Subsequently, Hudgens filed suit in the Fulton County Superior Court for a judgment declaring the Union's activity to constitute a trespass in violation of state law. The Georgia Court of Appeals held that the suit was preempted by the instant Board proceedings. Hudgens has filed a petition for certiorari to review that decision. *Scott Hudgens* v. *Local 315, Retail & Wholesale Department Store Union, AFL–CIO*, No. 74–1032.

[8] It is undisputed that Hudgens is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, 29 U.S.C. 152(6) and (7) (Pet. App. A34–A35; A. 5, 8, 11). Since Section 8(a)(1) of the Act makes it an unfair labor practice for "an employer" to "restrain, or coerce employees" in the exercise of their Section 7 rights, a generic employer may violate Section 8(a)(1) with respect to employees other than his own. See *Austin Co.*, 101 NLRB 1257, 1258–1259. See also Section 2(13) of the Act, 29 U.S.C. 152(3).

because someone else, [Hudgens], was the technical owner of the shopping mall and the land surrounding it" (*id.* at A19). The Board was of the view that Butler's warehouse employees were within the scope of Hudgens' invitation to the public to come to the shopping center to do business with its tenants (*ibid.*). The Board added that its decision (*ibid.*)——

> achieves a desirable accommodation between [Hudgens'] property rights and the employees' Section 7 rights by according employees the right to picket their employer at such a proximate location, directly in front of the employer's premises, rather than requiring them to picket at a more distant location which may well be a common situs for entrance to other places of business and thus invite secondary effects.

C. THE COURT OF APPEALS' DECISION

Upon review, the court of appeals enforced the Board's order (Pet. App. A1–A15). The court concluded that this Court's decision in *Lloyd Corp.* v. *Tanner*, 407 U.S. 551, "although having its genesis in the constitutional issues" there raised, "isolates the factors relevant to determining when private property rights of a shopping center owner should be required to yield to the section 7 rights of labor picketers" (*id.* at A10). Applying those factors here, the court held that the Section 7 rights of the picketing employees were entitled to prevail since the picketing was related to the normal functions of the shopping center and

alternatives to the picketing were either unavailable or inadequate (*id.* at A10–A15).

SUMMARY OF ARGUMENT

I

The court below correctly concluded that it was proper to utilize the criteria formulated in *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 and *Lloyd Corp.* v. *Tanner*, 407 U.S. 551, in determining whether the National Labor Relations Act entitled Butler's employees to picket at Hudgens' North DeKalb Shopping Center. For the property here, as in those cases, has assumed "to some significant degree the functional attributes of public property devoted to public use" (*Central Hardware Co.* v. *National Labor Relations Board*, 407 U.S. 539, 547). It was not, as in *Central Hardware*, "private property used only for private purposes" (*ibid.*).

Thus, the shopping center here—which covers 55 acres and has 60 stores and parking facilities for 2,640 cars—is larger than that in *Logan Valley* and as big as that in *Lloyd*. As in *Logan Valley*, there are no public streets or sidewalks traversing the center; the nearest public streets are separated from the building by a 500-foot stretch of parking facilities. Moreover, as in *Lloyd*, the stores are in a central building and most are accessible only from the mall in the interior of the building.

II

Under the *Logan Valley-Lloyd* criteria, a person may peacefully picket or distribute handbills at a shopping center of the type here if (1) the activity is directly related to the use to which the center is being put, and (2) no other reasonable opportunities for conveying the message of the pickets or the handbillers to the intended audience are available. Both of these conditions were satisfied here.

A. The picketing was directed at the labor policies of Butler, the lessee of one of the stores in the shopping center. Although the underlying contract dispute involved Butler's warehouse employees, they were entitled, under Section 7 of the Act, to carry their dispute to their fellow employees working at Butler's store in the center. See *Houston Insulation Contractors Ass'n* v. *National Labor Relations Board*, 386 U.S. 664. And Butler, the employer of both the warehouse and the store employees, was in a position fully to resolve the dispute by granting the warehouse employees' contract demands. Moreover, since "[p]otential customers of Butler's North DeKalb store comprised a group within the scope of the broad invitation issued by Hudgens to the public to come and shop at center stores," the "picketers" message to withhold patronage from the Butler store was directly related to Hudgens' invitation" (Pet. App. A11).

By contrast, the handbilling in *Lloyd* "had no relation to any purpose for which the center was built and being used." *Lloyd Corp.* v. *Tanner*, *supra*, 407

U.S. at 564. There, the "message sought to be conveyed by respondents," a protest against the Vietnam War, "was directed to all members of the public, not solely to patrons of Lloyd Center or of any of its operations." *Ibid.*

B. Here, as in *Logan Valley,* there is no public property in the vicinity of the Butler store where the picketing could reasonably be conducted. The public road entrances to the shopping center are nearly 500 feet away from the building which housed the Butler store. Butler's customers and store employees who are already at the building would be too far away to read the placards of pickets at these road entrances. Nor could the placards adequately be read by them as they entered or left the shopping center, for they would be moving by car or bus, and traffic jams or accidents were likely if the vehicles paused. In addition, the pickets would be placed in danger by walking along the public roads outside the shopping center, for there are no public sidewalks adjacent thereto. Finally, picketing outside the center would run the risk of enmeshing a substantial number of neutrals in the employees' dispute with Butler.

The Union did not have the burden of establishing that it could not have reached the customers of Butler's store by such other methods as newspaper, television, and radio advertising. While on purely private property a proper balance between employee rights and the employer's property rights may require that a non-employee forego an appeal at or near the employer's property if there are other means of mak-

ing that appeal elsewhere (see *Central Hardware, supra*), a different balance is appropriate for quasi public property, such as the shopping center here. On quasi public property, the relevant inquiry is not whether a consumer appeal may be made by means other than picketing and handbilling, but whether there are purely public locations where that activity can be carried on effectively without access to the quasi public property. If no such purely public locations are available, then the appeal can be made on the quasi public property, at least where, as here, it is directly related to the purpose for which the property is being used. The contrary conclusion would permit "businesses situated in the suburbs * * * largely [to] immunize themselves from [on-the-spot] criticism by creating a *cordon sanitaire* of parking lots around their stores." *Amalgamated Food Employees* v. *Logan Valley Plaza, supra,* 391 U.S. at 325.

ARGUMENT

THE BOARD PROPERLY CONCLUDED THAT HUDGENS VIOLATED SECTION 8(a)(1) OF THE NATIONAL LABOR RELATIONS ACT BY PROHIBITING BUTLER'S WAREHOUSE EMPLOYEES FROM PICKETING THEIR EMPLOYER AT ITS RETAIL STORE LOCATED IN HUDGENS' SHOPPING CENTER

Section 7 of the National Labor Relations Act, 29 U.S.C. 157, guarantees to employees the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection," and Section 8(a)(1), 29 U.S.C. 158(a)(1), prohibits employer interference with that right. Peace-

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ful picketing in support of a lawful objective is a classic form of protected concerted activity. *United Steelworkers* v. *National Labor Relations Board* (*Carrier Corp.*), 376 U.S. 492, 498–499; *National Labor Relations Board* v. *Fruit & Vegetable Packers* (*Tree Fruits*), 377 U.S. 58, 62–63; *International Longshoremen's Ass'n, Local 1416* v. *Ariadne Shipping Co.*, 397 U.S. 195, 200–201; *National Labor Relations Board* v. *Cold Storage Corp.*, 203 F. 2d 924, 927 (C.A. 5), certiorari denied, 346 U.S. 818. Its protected status is reinforced by Section 13, 29 U.S.C. 163, which states that nothing in the Act, "except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike." See *National Labor Relations Board* v. *International Rice Milling Co.*, 341 U.S. 665, 672–673; *National Labor Relations Board* v. *Drivers Local 639* (*Curtis Bros.*), 362 U.S. 274, 281–292, and n. 9.

However, when Section 7 rights conflict with an employer's [9] property rights, it is necessary to balance the competing legitimate interests. See *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793; *National Labor Relations Board* v. *Babcock & Wilcox Co.*, 351 U.S. 105; *Central Hardware Co.* v. *National Labor Relations Board*, 407 U.S. 539; *Fafnir Bearing Co.* v. *National Labor Relations Board*, 362 F. 2d 716, 722 (C.A. 2). Congress entrusted the Board with the primary responsibility for making this accommodation, and its judgment, if reasonable, should be accepted by the reviewing court. Cf. *National Labor Relations Board* v. *Truck Drivers Local 449* (*Buffalo Linen Exchange*), 353 U.S. 87, 97; *National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221, 235–236. "The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board." *National Labor Relations Board* v. *Weingarten, Inc.*, 420 U.S. 251, 266. And where, in construing the reach of Section 7, the Board engages in the "'difficult and delicate responsibility' of reconciling conflicting interests of labor and management, the balance struck by the Board is 'subject to limited judicial review.'" *Id.* at 267, quoting from *Truck Drivers Local 449, supra*, 353 U.S. at 96.

[9] It is undisputed that Hudgens is "an employer" within the meaning of the relevant provisions of the Act. See n. 8, *supra*.

Guidance as to the proper accommodation between the employer's property rights and the employees' Section 7 rights in the situation here is afforded by this Court's decisions in *Central Hardware Co.* v. *National Labor Relations Board*, 407 U.S. 539, and *Lloyd Corp.* v. *Tanner*, 407 U.S. 551. In those cases, the Court drew a distinction between privately owned property which has assumed "to some significant degree the functional attributes of public property devoted to public use," and "private property used only for private purposes" (407 U.S. at 547). The Court found that a large commercial shopping center—such as that involved in *Lloyd Corp.* and in the earlier *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308—"had displaced, in certain relevant respects, the functions of the normal municipal 'business block'" (407 U.S. at 547). It held that the First Amendment gives to all persons the right peacefully to picket or distribute handbills at such a

shopping center provided that (1) the activity was "'directly related in its purpose to the use to which the shopping center property was being put'," and (2) "no other reasonable opportunities for the pickets to convey their message to their intended audience were available" (407 U.S. at 563).[10] On the other hand, the Court found that the free standing stores in *Central Hardware* did not lose their character as "private property used only for private purposes" because they had parking lots which were "open to the public" and there were other retail stores in the vicinity which were not part of a shopping center complex (407 U.S. at 540, 547). Thus, it held that non-employee union organizers had only such access to that property as was accorded by Section 7 of the National Labor Relations Act—which in that case meant that they were entitled to reach employees on the property only if, by reasonable efforts, they could not reach them by other means. Accord: *National Labor Relations Board* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 112–113.

This Court did not hold in *Central Hardware,* as petitioner suggests (Br. 12), that First Amendment considerations have no relevance in defining the scope of Section 7 of the Act. First Amendment considerations were deemed inapplicable in *Central Hardware* (407 U.S. at 547) because that case involved purely private property (as opposed to "pri-

[10] With respect to private property which has assumed all of the functions of a municipal business block, the First Amendment affords a right of access without satisfying these conditions. See *Marsh* v. *Alabama*, 326 U.S. 501.

vately owned property" which has "assume[d] to some significant degree the functional attributes of public property devoted to public use") to which the Constitution affords no right of access; there can in that context be no congruence between constitutional rights and those afforded by Section 7 of the National Labor Relations Act. However, where the property involved is the functional equivalent of a business block, the Constitution does afford a right of access. In these circumstances, it is reasonable and proper, in striking a balance between employee rights and property rights for purposes of the National Labor Relations Act, to apply the criteria mandated by the Constitution.[11] The contrary conclusion would lead to the anomaly that employees could obtain greater protection for their right to strike and peacefully picket by court suits than they could by invoking the procedures of the National Labor Relations Act, which were specifically designed to afford such protection. In short, while, as petitioner concedes (Br. 13), Section 7 may, in some circumstances, grant " 'broader' rights than the First Amendment, *viz,* the Act permits access on private property, regardless of its functional equivalence to public property," the rights accorded by Section 7 are not more restricted than those protected by the First Amendment.

The court below correctly concluded that it was proper to utilize the criteria formulated in *Logan Valley* and *Lloyd Corp.* in determining whether the National Labor Relations Act entitled Butler's employ-

[11] Cf. *Thomas* v. *Collins*, 323 U.S. 516, 533–534; *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, 617–618.

ees to picket at the shopping center here. For, as we show below, the property here, as in those cases, has assumed "to some significant degree the functional attributes of public property devoted to public use." We further show that the court below also correctly concluded that the *Logan Valley-Lloyd* criteria were satisfied here [12]—i.e., the picketing was directly related to the use of the shopping center, and no other reason-

[12] Nor is the use of those criteria precluded here (see Pet. Br. 12, n. 13) because the Board relied (Pet. App. A18) on its reasoning in *Frank Visceglia, t/a Peddie Buildings*, 203 NLRB 265 (discussed *infra*, p. 34, n. 26), where it had stated that "For the reasons expressed by the Supreme Court in *Central Hardware*, *supra*, we find the principles of *Babcock & Wilcox*, rather than those of *Logan Valley*, to be applicable to the present case" (*id.* at 266–267). In thus recognizing that, in making an accommodation between Section 7 rights and property rights under the National Labor Relations Act, the constitutional criteria enunciated in *Logan Valley* are not automatically appropriate (as the Board had erroneously assumed in *Central Hardware*), the Board did not intend to suggest that those criteria could not be adopted for purposes of the Act where, as here, there is a congruence between Section 7 and constitutional rights.

In any event, the *Babcock & Wilcox-Central Hardware* criteria, which are concerned with organizational activity on wholly private proverty (see *Central Hardware*, *supra*, 407 U.S. at 544–545; and Amicus brief of Chamber of Commerce (pp. 8–9, n. 5)), differ from the *Logan Valley-Lloyd* criteria only in that the showing required to establish the inadequacy of alternative avenues of communication is more stringent in the case of appeals by "outsiders" on wholly private property than it is in the case of such appeals on quasi public property (see *infra*, pp. 29–32). The Administrative Law Judge's findings on alternative avenues of communication (Pet. App. A27–A31), which were not disturbed by the Board (Pet. App. A18–A19), comport with the showing required for quasi public property.

able opportunities for conveying the pickets' message to its intended audience were available.[13]

A. THE SHOPPING CENTER HERE IS SUBSTANTIALLY LIKE THOSE INVOLVED IN LOGAN VALLEY AND LLOYD

In *Logan Valley,* the privately owned shopping center contained two stores at the time of the picketing, although other businesses were then expected and later moved into the center. The center was situated at the intersection of two public roads, one a high speed highway, off which there were five entrances into the center; aside from these entrances, the center was totally separated from the adjoining roads by earthern berms, 12 to 15 feet wide. The buildings in the center were separated from the berms by a 350 to 500 foot expanse of common parking facilities. (391 U.S. at 310–311.)

In *Lloyd,* the shopping center was located on a 50-acre site in downtown Portland, Oregon. It was bounded by four public streets and it was crossed in varying degrees by several other public streets, which had adjacent public sidewalks. Except for these public streets and sidewalks, all of the land and buildings within the center were privately owned. There were 60 commercial establishments, and open and covered

[13] It is not clear whether both of these criteria must be satisfied before access to quasi public property is permitted, or whether it is only necessary to satisfy one of them. Thus, in *Lloyd*, the Court, although finding that the relation criterion was not satisfied, went on to show that neither was the alternative forum criterion. See Note, *The Supreme Court, 1971 Term*, 86 Harv. L. Rev. 1, 128–129 (1972). In any event, as we show below, both of these criteria are satisfied here.

parking facilities which accommodated more than 1,000 automobiles. The stores were all located within a single, multi-level building complex. Within this complex, in addition to the stores, there were parking facilities, malls, private sidewalks, stairways, escalators, gardens, and an auditorium and a skating rink. Some of the stores opened directly on the outside public sidewalks, but most opened on the interior privately owned malls; some stores opened on both. The malls were private, interior promenades with 10-foot sidewalks serving the stores, and with a center strip 30 feet wide in which flowers and shrubs were planted, and statuary, fountains, benches, and other amenities were located. (407 U.S. at 553.)

The shopping center here—which covers 55 acres and has 60 stores and parking facilities for 2,640 cars—is larger than that in *Logan Valley* and as big as that in *Lloyd*. Like *Logan Valley*, but unlike *Lloyd*, there are no public streets or sidewalks traversing the center; the nearest public streets are separated from the building by a 500-foot stretch of parking facilities. Moreover, here, as in *Lloyd*, most of the stores are in an enclosed central building and are accessible only from the interior of the building, which has wide aisles that contain benches and other facilities normally found on public sidewalks or outdoor malls and parks.

In sum, the same factors which led the Court to conclude that the shopping centers in *Logan Valley* and *Lloyd* were privately owned property which had assumed "to some significant degree the functional attributes of public property devoted to public use" (*Central Hardware, supra,* 407 U.S. at 547) are present here.[14] Unlike the situation in *Central Hardware*, the argument that the shopping center here has "acquired the characteristics of a public municipal facility" is not dependent upon the one fact that the parking lots are " 'open to the public' " (*ibid.*).

B. THE PICKETING WAS DIRECTLY RELATED TO THE USE OF THE CENTER

As shown (*supra,* pp. 6–7), Butler's warehouse employees sought to put economic pressure on their employer in support of their lawful contract demands by appealing, through peaceful picketing at Butler's retail store in the shopping center, to their fellow Butler employees not to work for Butler, and to Butler's customers not to purchase its products. Thus, the picketing was addressed to the labor policies of Butler, who was in a position fully to resolve the dispute by granting the picketers' contract demands. Moreover, as the court below noted (Pet. App. A11), "[p]otential customers of Butler's North DeKalb store comprised a group within the scope of the broad invitation issued by Hudgens to the public to come and shop at center stores"; the "picketers' message to withhold patronage from the Butler store was directly related to Hudgens' invitation * * *." In these circumstances, the picketing was related to

[14] By contrast, *S. E. Nichols of Ohio*, 200 NLRB 1130 (Pet. Br. 13–14), involved wholly private property, like that in *Central Hardware* (see Pet. App. A26, n. 1).

the use of the center no less than was the picketing in *Logan Valley.*

Nor is a different conclusion required by petitioner's contention (Br. 17–18; CC Br. 8–9) that, in *Logan Valley,* the picketers, who were non-employees, were seeking to organize, and thus were concerned with the labor policies of, the store in the shopping center. The question is not whether the activity is tied to a labor dispute involving the particular store, but whether it has a "relation to any purpose for which the center was built and being used." *Lloyd Corp.* v. *Tanner, supra,* 407 U.S. at 564. Since the center was designed to attract customers to the stores therein and since the picketing sought to induce Butler's customers to withhold such patronage, it was directly related to a "purpose for which the center was built and being used." [15]

This view is confirmed by contrasting the appeal in *Lloyd.* There, the Court found that the handbilling, which protested the Vietnam War, "had no relation to any purpose for which the center was built and being used." For the "message sought to be conveyed by respondents was directed to all members of the public, not solely to patrons of Lloyd Center or any of its operations. Respondents could have distributed these

[15] Petitioner contends that, where there is a "dispute involving employees of a tenant working at the situs, a center owner could intervene in the dispute to pressure, or conceivably even remove, an offending tenant to insure tranquility on his property" (Br. 17; see also CC Br. 12–13). There is no reason why Hudgens does not have the same leverage over Butler; while the dispute did not directly involve Butler's store employees, it spilled over to Hudgens' property and Butler had power to resolve it.

handbills on any public street, on any public sidewalk, in any public park, or in any public building in the city of Portland." *Lloyd Corp.* v. *Tanner, supra,* 407 U.S. at 564. Here, by contrast, the message sought to be conveyed by the picketers was specifically directed to patrons of Butler's retail store and sought to induce them to withhold patronage from that store because of Butler's labor policies.[16]

Moreover, even if, contrary to the foregoing, a labor dispute involving the particular store be required, it is present here. For it is well settled that, under the National Labor Relations Act, employees in one bargaining unit, who are engaged in a labor dispute with their employer, may lawfully appeal for support, and thereby extend their dispute, to other units of the same employer.[17] See *Houston Insulation Contractors Ass'n* v. *National Labor Relations Board,* 386 U.S. 664; *National Labor Relations Board* v. *General Drivers, Local 968,* 225 F. 2d 205 (C.A. 5), certiorari denied, 350 U.S. 914; *Milwaukee Plywood Co.* v. *National Labor Relations Board,* 285 F. 2d 325 (C.A. 7).

[16] As the dissenters in *Lloyd* noted: "If respondents had distributed handbills complaining about one or more stores in Lloyd Center or about the Center itself, petitioner concedes that our decision in *Logan Valley* would insulate that conduct from proscription by the Center" (407 U.S. at 579–580). The dissenters further noted that the "record indicates that when unions have picketed inside the Mall, Lloyd Center has voiced no objections" (*id.* at 580, n. 4).

[17] The parties stipulated that Butler was a single employer for purposes of the Act, although its warehouse and its retail store constituted separate units for bargaining purposes (A. 147–148).

As this Court stated in *Houston Insulation, supra,* 386 U.S. at 668–669:

> Primary employees have traditionally been assured the right to take concerted action against their employer to gain the "mutual aid or protection" guaranteed by § 7 of the National Labor Relations Act, as amended, 61 Stat. 140, whether or not the resolution of the particular dispute directly affects all of them. As Judge Learned Hand stated in *Labor Board* v. *Peter Cailler Kohler Swiss Chocolates Co.,* 130 F. 2d 503, 505–506:
>
> > "When all the other workmen in a shop make common cause with a fellow workman over his separate grievance, and go out on strike in his support, they engage in a 'concerted activity' for 'mutual aid or protection,' although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each one of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping; and the solidarity so established is 'mutual aid' in the most literal sense, as nobody doubts."

C. PICKETING AT THE ENTRANCES TO BUTLER'S STORE AFFORDED THE ONLY REASONABLE MEANS OF CONVEYING THE PICKETS' MESSAGE TO ITS INTENDED AUDIENCE

The Board found, and the court of appeals sustained its finding (Pet App. A14), that the pickets were

forced to leave the shopping center altogether.[18] Thus, the nearest wholly public area in which the picketing could occur was on the public highways some 500 feet away. As we show below (pp. 27–28, *infra*), this was not a reasonable alternative.

Petitioner suggests (Br. 6 n. 9), however, that the pickets were informed that picketing was permissible at the entrances to the mall on the outside sidewalk and in the shopping center parking lot. This assertion is at best ambiguous because petitioner refrains from representing that his policy is to permit picketing in these areas, and the record is to the contrary. See n. 18, *supra,* and the Administrative Law Judge's finding that, while petitioner asserted in his brief that picketing was permissible in the parking lot

[18] This finding is supported by substantial evidence. Three pickets, who appeared as witnesses at the Board hearing, testified that Hudgens' agent, Ballard, told them that they would have to picket on the public roads (A. 79, 90, 98). This testimony is consistent with Hudgens' admitted policy of not allowing "anyone to march up and down with placards * * * in the mall and the parking lot" (A. 123). The Administrative Law Judge (Pet. App. A25–A26) credited the pickets' testimony and discredited Ballard's testimony (A. 134–135) that he told the pickets they could picket on the parking lot or on the public roads. The Board affirmed this finding (Pet. App. A–18).

There is no evidentiary support for petitioner's assertion (Br. 6, n. 9) that the parties were nonetheless put on notice that "the proscription upon the Union's picketing pertained only to the mall interior and that picketing elsewhere on Hudgens' property was permissible." Moreover, the Ballard affidavit in the printed appendix (A. 19) is not accurate. The phrase "our lawyer, Dock Heard Davis told them that they could picket on the sidewalks to the mall" (*ibid.*) was deleted from the affidavit which was placed in the record.

area, he also claimed the right "to eject the pickets from the parking lot area, if one day [he] should so choose" (Pet. App. A26).

Indeed, when petitioner sought a declaration of rights under the Georgia criminal trespass law in the state courts, he made no distinction between the enclosed mall and other center areas; rather, he sought a declaration of his right to exclude the pickets from the shopping center entirely. See page 4 of the Appendix to the petition for a writ of certiorari in *Hudgens* v. *Local 315 Retail, Wholesale and Department Store Union, AFL–CIO,* No. 74–1032.[19] Moreover, the claimed right to exclude the pickets from the center entirely is consistent with petitioner's arguments in his brief here that the test of *National Labor Relations Board* v. *Babcock & Wilcox Co., supra,* 351 U.S. 105, affords no right of access in this case.[20]

Thus, this is not a case, as petitioner implies (Br. 6, n. 9), where the Board misapprehended the employer's policy concerning picketing. And, to the extent petitioner is now making an alternative contention—that, if *Logan Valley-Lloyd* criteria are applicable, the existence of exterior center locations are a reasonable alternative to picketing inside the mall—that alternative was properly rejected by the Board. See p. 33 and n. 25, *infra.*

[19] And in *Steffel* v. *Thompson,* 415 U.S. 452, 455, which also involved petitioner's shopping center, individuals were forced to discontinue handbilling "on an exterior sidewalk" of the center.

[20] As we have shown (pp. 14–18, *supra*), *Babcock & Wilcox* has no application here.

1. As the court below noted (Pet. App. A12), "the intended audience of the picketing in the instant case included not only the employees of Butler's at the North DeKalb Shopping Center but also the potential customers of Butler's North DeKalb store. This latter audience was only identifiable as part of the citizenry of greater Atlanta until it approached the store * * *." "This contrasts," the court added (*ibid.*), "with organizational campaigns in which the audience solicited is composed of employees of a particular employer, a limited usually identifiable group, which often can be reached very effectively by means other than personal contact on the employer's private property."[21] Moreover, picketing is uniquely an activity which is dependent for success on the location where it takes place. As this Court has indicated (*Hughes* v. *Superior Court,* 339 U.S. 460, 465):

> Publication in a newspaper, or by distribution of circulars, may convey the same information or make the same charge as do those patrolling a picket line. But the very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication. The loyalties and responses evoked and exacted by picket lines are unlike those flowing from appeals by printed word. * * *

See also the findings of the Administrative Law Judge (Pet. App. A29–A31), which were accepted by the

[21] As noted (*supra,* p. 18, n. 12), organizational campaigns were involved in *Babcock & Wilcox,* and *Central Hardware.*

Board (*id.* at A18), that there were no reasonable alternatives to picketing at the shopping center. And see *United Steelworkers* v. *National Labor Relations Board, supra,* 376 U.S. at 499.

2. Here, as in *Logan Valley,* there is no public property in the vicinity of the Butler store where the picketing could reasonably be carried on. In *Logan Valley,* the Court sanctioned picketing in the parcel pickup area in front of the Weis store, and the portion of the parking lot immediately adjacent thereto, because: (a) the nearest wholly public areas for picketing were the berms surrounding the shopping center, some 350 to 500 feet away; (b) since all entry onto the mall premises by Weis' customers was by vehicle from the roads along which the berms ran, it would be difficult for them to read the placards of pickets located on the berms or the public roads; (c) the pickets would be placed in some danger by being forced to walk along heavily traveled roads; and (d) if the picketing took place outside the shopping center, it would be difficult to limit its effect to Weis alone (391 U.S. at 322–323).

Similarly here, the nearest wholly public areas for picketing are at the public road entrances to the shopping center, which are nearly 500 feet away from the building which housed the Butler store. Butler's customers and store employees enter the shopping center by vehicle via the public roads, including Lawrenceville Highway, a busy four-lane road. Those already at

the building would be too far away to read the placards of pickets at the entrances to the shopping center; indeed, those inside the building would not be able to see the pickets or their placards at all. Nor could the placards adequately be read by Butler's customers and store employees as they entered or left the shopping center for they would be moving by car or bus, and there would be a danger of traffic jams or accidents if the vehicles paused. In addition, the pickets would be placed in some danger by walking along the public roads outside the shopping center, for there are no public sidewalks at the point where they meet the shopping center or its entrances, and the rights of way at each entrance are not adequate for patrolling. Finally, picketing outside the center would "render it very difficult for the [employees] to limit its effect to [Butler] only" (*Logan Valley, supra,* 391 U.S. at 323).[22] The enmeshment of a substantial number of neutrals in the employees' dispute with Butler, in turn, would be contrary to Congress' objective, in enacting Section 8(b)(4) of the Act, "to restrict the area of industrial conflict" to the primary disputants. *Local 1976, United Brotherhood of Carpenters* v. *National Labor Relations Board* (*Sand Door*), 357 U.S. 93, 100. See also *Honolulu Typographical Union No. 37* v. *National Labor Relations*

[22] Indeed, the risk of broadening the appeal would be greater here than in *Logan Valley* since there are 60 establishments in the North DeKalb Center, while there were only two in Logan Valley Plaza at the time of the picketing there.

Board, 401 F. 2d 952, 957–958 (C.A.D.C.); *Retail Fruit & Vegetable Clerks* v. *National Labor Relations Board* (*Crystal Palace Markets*), 249 F. 2d 591 (C.A. 9).

In contrast, the center involved in *Lloyd* was within the City of Portland, was bounded and traversed by public streets and sidewalks, and included a public park. As the Court stated, the central building complex in Lloyd Center "was surrounded by public sidewalks, totaling 66 linear blocks," and "[a]ll persons who enter or leave the private areas within the complex must cross public streets and sidewalks, either on foot or in automobiles." *Lloyd, supra*, 407 U.S. at 566. Moreover, the handbills were not related to any particular store in the center, but could have been distributed "on any public street, on any public sidewalk, in any public park, or in any public building in the city of Portland." *Id.* at 564.

3. Contrary to petitioner's contention (Br. 18–21; CC Br. 15–16), the Union did not have the burden of establishing that it could not have reached the customers of Butler's North DeKalb store by newspaper, television, and radio advertising, direct mailing, or other advertising devices directed at the geographical area from which that store drew its customers. Even if these methods were economical and effective in attracting customers to the shopping center for commercial purposes,[23] the Union was not required to forego its

[23] The evidence adduced by petitioner merely shows that such methods had been used to promote various programs and thereby to attract persons to the shopping center as a whole, rather than to any particular store (A. 159, 163, 167–168). This evidence hardly measures the effectiveness of those methods in keeping customers away from a particular shop. Moreover, as the court below noted (Pet. App. A14):

"[A]ll of the Butler stores in the Atlanta area were being picketed at the time the instant dispute arose. Since North DeKalb Shopping Center draws its customers from the entire Atlanta area, it would be totally unreasonable to require the union to advertise through the entire Atlanta area to reach the potential customers of this one remaining store. An accommodation which required such a procedure would unjustifiably denigrate section 7 rights."

See also Pet. App. A30.

right, guaranteed by the Constitution and hence also by Section 7 of the Act (see *supra*, p. 16–17, n. 12), to make its appeal to customers of the Butler store through peaceful picketing at a location in reasonable proximity to that store.

Thus, while on purely private property a proper balance between employee rights and the employer's property rights may require that a non-employee forego an appeal at or near the employer's property if there are other means of making that appeal elsewhere (see *Babcock & Wilcox* and *Central Hardware, supra*), a different balance is appropriate for quasi public property, such as the shopping center here. On quasi public property, the relevant inquiry is not whether other methods of making a consumer appeal are available, but, if such traditional location-oriented methods as picketing and handbilling are chosen for that purpose, whether there are purely public locations

where that activity can be carried on effectively without access to the quasi public property. If no such purely public locations are available, then the appeal can be made on the quasi public property, at least where, as here, it is directly related to the purpose for which the property is being used.

Accordingly, in *Logan Valley,* the Court did not inquire—as it would have in the case of purely private property governed by the *Babcock & Wilcox-Central Hardware* criteria—whether there were other effective methods besides picketing for organizing the employees at the Weis market. Nor in *Lloyd* did it inquire whether newspaper advertising would have been as effective as handbilling for conveying the anti-war message to the public. Rather, in both cases, the pertinent question was whether there were purely public locations in the vicinity where the picketers or handbillers could convey their message effectively without access to the quasi public property. See *Lloyd Corp.* v. *Tanner, supra,* 407 U.S. at 566, and n. 12.

The contrary position urged by petitioner—*i.e.,* that picketing or handbilling can be resorted to only if the public could not effectively be reached by other media—would produce a result "at variance with the goal of free expression and communication that is the heart of the First Amendment." "Business enterprises located in downtown areas would be subject to on-the-spot public criticism for their practices, but businesses situated in the suburbs could largely immunize themselves from similar criticism by creating a *cordon sanitaire* of parking lots around their stores." *Amalgamated Food Employees* v. *Logan Valley Plaza, supra,* 391 U.S. at 324–325.

4. As noted, *supra,* the picketing in *Logan Valley* occurred in the parcel pickup area and the parking area in front of the Weis store; whereas here the picketing occurred, not on the private sidewalk outside of the building which housed the Butler store, but on the mall inside of that building, in the area adjacent to the Butler store. Contrary to petitioner's contention (Br. 12–13, n. 14), permitting picketing in the enclosed mall near Butler's store is not the equivalent of permitting it within the store itself. As shown (*supra,* pp. 4–5), since most of the stores are accessible only from the interior of the building, the aisles in the enclosed mall, which are 35 to 40 feet wide, provide the equivalent of public sidewalks in front of the stores. Indeed, the mall contains benches and other facilities normally found on public sidewalks or malls. The enclosed feature of the mall simply affords the stores' customers protection from the elements (A. 116); there is no evidence that it was intended to make the mall more restricted than the rest of the shopping center.[24] Cf. *In re Hoffman,* 67 Cal. 2d 845, 851, 434 P. 2d 353, 357; *Wolin* v. *Port Authority,* 392 F. 2d 83 (C.A. 2), certiorari denied, 393 U.S. 940.

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[24] The doors of the building are open to the public on weekdays from 7 a.m. to 10 p.m., and on Sundays from 10 a.m. until 7 p.m. (*supra,* p. 5).

Moreover, even if it were assumed that petitioner would have permitted picketing on the outside sidewalk at the mall entrances or on the parking lot (but see pp. 25–26, *supra*), such areas, which are removed from the immediate vicinity of Butler's store, do not present reasonable alternatives to picketing on the 35–40 feet wide aisles adjacent to Butler's store. Thus, the Board properly concluded (Pet. App. A19) that its order achieves:

> * * * a desirable accommodation between [petitioner's] property rights and the employees' Section 7 rights by according employees the right to picket their employer at such a proximate location, directly in front of the employer's premises, *rather than requiring them to picket at a more distant location which may well be a common situs for entrance to other places of business and thus invite secondary effects.* [Emphasis added.][25]

Finally, it is significant that the picketing here was confined to the immediate area in front of the Butler store, it was peaceful, and it did not obstruct the entrances to the store or interfere with the passage of people in the aisles (A. 80, 85–86, 95–96, 100).[26]

[25] Although the Board's Supplemental Decision does not expressly refer to the mall entrances on the exterior sidewalk or the parking lot, the Board's conclusion that those areas do not represent reasonable alternatives to picketing inside the mall is indicated by the provision of its order which requires petitioner to cease and desist from barring peaceful picketing "within the enclosed mall area of respondent's shopping center" (Pet. App. A39). Thus, while the decision concerning this point may perhaps be "of less than ideal clarity," the Board's "path may reasonably be discerned" and should be upheld. See *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System*, 419 U.S. 281, 286.

[26] This case is thus distinguishable from *Taggart* v. *Weinacker's, Inc.*, 397 U.S. 223, and *Marshall Field & Co.* v. *National Labor Relations Board*, 200 F. 2d 375 (C.A. 7). In *Taggart*, this Court, finding that certiorari had been improvidently granted, left standing a decision of the Alabama Supreme Court which was premised on a trial court finding that picketing on a narrow 4–5 foot sidewalk had caused actual customer obstruction (214 So. 2d 913, 919). And in *Marshall Field* the record showed actual disruptions by "loud and rowdy" organizers, inside a department store (200 F. 2d at 378, 382).

Similarly distinguishable is *National Labor Relations Board* v. *Visceglia, t/a Peddie Buildings*, 498 F. 2d 43 (C.A. 3). The Third Circuit there rejected the Board's finding that the private owners of an industrial park violated the Act by excluding employees of a lessee from picketing inside the park. An industrial park does not as clearly have the "functional attributes of public property devoted to public use" as does a shopping center of the type here. Moreover, the Third Circuit found that the record in that case did not present the issue "whether *Logan Valley* applies to pickets (labor or others) in industrial parks" (*id.* at 45, n. 3). The court also found that, unlike here, there was "no evidence" that the pickets could not have effectively communicated their message "to the appropriate people" at the entrance to the park (*id.* at 49).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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